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Supreme Court, U.S.
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In The Supreme Court of the United States

E. JOSEPH FACE, JR., in his official capacity as Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission, and SUSAN E. HANCOCK, in her official capacity as Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

Petitioners,

v.

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Nothing in respondent's brief in opposition calls into question the need for this Court to review and reverse the decision below. Respondent does not contest that this Court's sovereign immunity jurisprudence is fundamentally different than it was a generation ago when *Hutto v. Finney*, 437 U.S. 678 (1978), was decided. Nor does it even attempt to demonstrate that, under current jurisprudence, *Hutto* is decided correctly. Furthermore, respondent does not dispute that "if Congress intends to alter the usual constitutional balance between the States and the federal government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1990). Nor does it even attempt to argue that, in enacting 42 U.S.C. § 1988, Congress clearly and unambiguously stated its intention *within the statutory text* to impose an attorneys' fees regime that discriminates against the States. Rather, respondent ignores the jurisprudence of the past decade and simply asserts that *Hutto* should stand, along with *Hensley v. Eckerhart*, 461 U.S. 424 (1983), which interpreted § 1988 to discriminate against the States.

1. "A constitutional decision that is wrong should not stand." *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, 85 (1938) (Black, J., dissenting). This Court has recognized the truth of Justice Black's statement. Over the years, it has not hesitated to correct its previous constitutional errors, even when those errors have become a generally accepted part of our constitutional jurisprudence. *Compare, e.g., United States v. Dixon*, 509 U.S. 688 (1993), with *Grady v. Corbin*, 495 U.S. 508 (1990) (double jeopardy); *Payne v. Tennessee*, 501 U.S. 808 (1991), with *Booth v. Maryland*, 482 U.S. 496 (1987) (victim impact

evidence); *Brown v. Board of Educ.*, 347 U.S. 483 (1954), with *Plessy v. Ferguson*, 163 U.S. 537 (1896) ("separate but equal").

This Court has shown a particular willingness to revisit its decisions concerning the role of the States in "our Nation's constitutional blueprint." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 122 S. Ct. 1864, 1870 (2002). For example, in 1989, this Court held that Congress could use its general Article I powers to abrogate the sovereign immunity of the States. *See Pennsylvania v. Union Gas*, 491 U.S. 1 (1989). Yet, a mere seven years later, this Court held that abrogation of sovereign immunity was possible only if Congress exercised its powers under Section 5 of the Fourteenth Amendment. *See Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996). Similarly, in 1964, this Court held that mere participation in interstate commerce constituted a waiver of a State's sovereign immunity. *See Parden v. Terminal Railroad*, 377 U.S. 184 (1964). In 1999, this Court reexamined its decision and overruled it. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999). With this petition, the Commonwealth of Virginia, supported by fourteen other States and one territory as *amici*, asks this Court to reconsider its decision in *Hutto*. Like *Union Gas* and *Parden*, *Hutto* is a constitutional decision that is wrong and should not stand.

Of course, this Court's willingness to revisit its previous decisions is not limited to constitutional questions. This Court has also revisited its statutory constructions. For example, at one time this Court suggested that 42 U.S.C. § 1983 could be used to enforce any federal statute where Congress arguably intended a "benefit" for plaintiffs. *See Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509

(1990) ("Congress must have intended that the provision in question benefit the plaintiff"). However, this past term, this Court repudiated the language of *Wilder* and limited § 1983 actions to those statutes which clearly and unambiguously create new individual rights. *See Gonzaga Univ. v. Doe*, 122 S. Ct. 2268, 2275-77 (2002). This petition requests reconsideration of *Hensley*. Like the expansive language of *Wilder*, *Hensley* represents an erroneous statutory interpretation that must be corrected.

A writ should be granted so that this Court can reconsider its previous constitutional decision, *Hutto*, and its previous statutory decision, *Hensley*. The principles of stare decisis should not protect incorrect decisions touching on important principles of federalism.

2. Respondent's opposition altogether ignores the fact that, in the last few years, this Court's sovereign immunity jurisprudence has undergone a dramatic transformation. As explained in more detail in the petition, *Seminole Tribe* and its progeny hold that congressional abrogation of sovereign immunity can be accomplished only if (1) Congress unequivocally expressed its intent to abrogate immunity for claims based on a specific statute; and (2) Congress acted pursuant to § 5 of the Fourteenth Amendment. *Seminole Tribe*, 517 U.S. at 56-59. In deciding whether Congress acted pursuant to § 5 of the Fourteenth Amendment, this Court requires application of the two-part test from *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Even where Congress has passed a statute implicating the substantive guarantees of the Fourteenth Amendment, it may not abrogate sovereign immunity for that statute unless it can (1) "identify conduct transgressing the Fourteenth Amendment's substantive provisions" and (2) "tailor its legislative scheme to remedying or

preventing such conduct." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 639 (1999).

Yet, respondent ignores these developments and argues that this Court's reaffirmation of *Hutto* in *Missouri v. Jenkins*, 491 U.S. 274 (1989), makes it unnecessary to reexamine *Hutto* in light of more recent precedent. But, *Jenkins* was decided at the same time as *Union Gas,* which substantially expanded Congress' power to abrogate sovereign immunity. Given that *Seminole Tribe* repudiated *Union Gas*, there must be serious doubt about the continued viability of *Jenkins* as well as *Hutto*. Respondent's reliance on *Jenkins*, to the exclusion of more recent relevant cases, neatly underscores the need for this Court to revisit the question.

Quite simply, this Court has not yet applied its post-*Seminole Tribe* analytical framework to § 1988. As explained in the petition, that analysis raises serious doubt that § 1988 is a valid abrogation of sovereign immunity, at least in the context of a 42 U.S.C. § 1983 claim to enforce the Parity Act, 12 U.S.C. § 3801. The writ should be granted so that this Court may consider whether its previous interpretation of § 1988 meets the *Seminole Tribe* standard.

3. The respondent, apparently realizing that § 1988 does not meet the *Seminole Tribe* standard, argues that there is an alternative basis for the result in *Hutto*. Specifically, the respondent contends that the States historically have been liable for attorneys' fees as part of costs in federal court regardless of sovereign immunity concerns. In support of its contention, the respondent notes that the English Parliament and the colonial legislatures occasionally passed statutes that authorized courts to impose

attorneys' fee liability on common litigants as part of costs. The Congress enacted similar measures at various times. Because common litigants were sometimes liable for attorneys' fees as part of costs, the respondent asserts that the States were liable for attorneys' fees as part of costs regardless of sovereign immunity.

This assertion is seriously flawed. It ignores the fundamental distinction between a common litigant, such as a private party or a corporation or even a local governmental entity, and a *sovereign*, such as the Crown, the United States, or one of the States. The mere fact that common litigants in the federal courts sometimes were liable for attorneys' fees as part of costs does not necessarily mean that the sovereigns, the United States and the States, were liable for attorneys' fees as part of costs. Indeed, this Court has repeatedly recognized that, under basic principles of federalism, statutes that are applicable to common litigants are not applicable to the States.[1] *See Raygor v. Regents of the Univ. of Minn.*, 122 S. Ct. 999, 1006 (2002) (federal law which tolls statute of limitations on state law claims in federal court was inapplicable to the States); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000) (False

[1] Respondent's reference to English practice is unpersuasive for the additional reason that the English rule concerning attorneys' fees is in sharp contrast to the American rule, where the opposite approach is generally followed. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). Thus, even if the English rule allowed attorneys' fees to be awarded against the Crown – a claim not even respondent makes – it would not mean that an analogous practice was in place in America when the Constitution was ratified. "Of course, it is the American rather than the English common law tradition that is relevant." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

Claims Act is inapplicable to the States); *Will*, 491 U.S. at 70 (States may not be subjected to 42 U.S.C. § 1983 claims for damages); *cf. Alexander v. Sandoval*, 532 U.S. 275, 279-80 (2001) (declining to rule on the issue of whether there is a private right of action to enforce Title VI against the States). In other words, if respondent wishes to claim that the States historically have been subject to attorneys' fees as part of costs in federal courts, then the respondent must demonstrate that the States themselves, rather than common litigants, were subject to such liability. This they cannot do.

The States historically were not subject to liability for attorneys' fees in the federal courts, as shown by the fact that the States historically were not subject to the jurisdiction of the federal courts. *See Federal Maritime Comm'n*, 122 S. Ct. at 1870-71; *see also Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 846, 857 (1824) (holding that sovereign immunity barred a suit against the States). "The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" *Alden v. Maine,* 527 U.S. 706, 748 (1999) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). This was true even if a state officer, rather than the State itself, was named. *See Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110, 122-23 (1828). Indeed, it was not until 1908 that this Court firmly established jurisdiction to enjoin state officers who were violating federal law. *See Ex Parte Young*, 209 U.S. 123 (1908). And it was not until 1976 that this Court recognized a congressional power to abrogate

sovereign immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In sum, historically the States were not subject to the jurisdiction of the federal courts. Therefore, respondent is incorrect in its contention that the States have been historically subject to liability for attorneys' fees as part of costs in federal court.[2]

The respondent's contention that Congress has the power to subject the States to attorneys' fees regardless of the protections of sovereign immunity constitutes another reason for granting review. The writ should be granted to decide the validity of the respondent's contention.

4. Over the past two decades, this Court has recognized that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom" to be disregarded. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., joined by O'Connor, J., concurring). To protect the delicate balance between the States and the federal government, this Court has insisted that the sovereignty of the States can only be diminished by a clear expression of congressional intent contained in the statutory text. *See Raygor*, 122 S. Ct. at 1006. In other words, if Congress is going to impose a scheme where those who sue the States and prevail will recover fees as a matter of course, but that the States will

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[2] There may have been an exception for original jurisdiction actions filed by one state against another in the Supreme Court pursuant to Article III, § 2 of the Constitution. In such cases, the sovereign immunity of one litigant is counter-balanced by the sovereign immunity of the other, so that special rules may apply. In any event, the requirement that States reimburse the tribunal for the costs of litigation is fundamentally different from paying the legal fees of a private litigant.

recover fees in only the rarest of circumstances, the actual statutory text of § 1988 must say exactly that.

The respondent, apparently realizing that there is nothing in the text of § 1988 to support the result in *Hensley*, insists that the Clear Statement Rule should not apply. Instead, the respondent asserts that there is "abundant evidence of Congressional intent," and that this Court relies on "the legislative history of § 1988 in construing the statute." Br. in Opp. at 14-15. Respondent again ignores the fact that States, as sovereigns in our constitutional system, are fundamentally different from private parties or local governmental actors. As noted above, this Court has repeatedly recognized this distinction. *See Raygor,* 122 S. Ct. at 1008 (federal law which tolls statute of limitations on state law claims in federal court was inapplicable to the States); *Vermont Agency of Natural Resources*, 529 U.S. at 779 (False Claims Act is inapplicable to the States); *Will*, 491 U.S. at 70 (States may not be subjected to 42 U.S.C. § 1983 claims for damages).

Quite simply, there is a conflict between the Clear Statement Rule and the result in *Hensley* as applied to the States. The writ should be granted in order to resolve that conflict.

5. Finally, the respondent simply misconceives the fundamental nature of the question when it asserts that States "are treated no differently from any other *defendants*." Br. in Opp. at 14 (emphasis added). The issue is not that State defendants are treated differently from private parties who may be named as § 1983 defendants. The issue is that, under *Hensley,* State defendants are treated unfavorably compared to the private *plaintiffs* who have brought them into Court. The losing State defendant

is almost always required to pay attorneys' fees; the losing private plaintiff almost never is. Even if the definition of costs could be legislatively expanded to include attorneys' fees, this uneven treatment is inconsistent with the even-handed approach that has traditionally governed the allocation of costs.[3] A departure from this traditional even-handedness may be constitutional where sovereign immunity is not an issue, or where sovereign immunity has been properly abrogated under Section 5 of the Fourteenth Amendment; however, it cannot be sustained where – as here – the entire argument for subjecting States to attorneys' fees is based on the theory that it is traditional to do so. The Commonwealth has demonstrated why such a reading of American legal tradition is untenable; but, if that reading is to be accepted, then certainly the States must be entitled to its benefits as well as its burdens.

Thus, this petition again presents an important constitutional question deserving of review by this Court in light of recent developments in its sovereign immunity jurisprudence.

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[3] This tradition of even-handedness is demonstrated by respondent's reliance on *Alyeska* for the proposition that "since 1607 English courts have been empowered to award counsel fees to defendants *in all actions where such awards might be made to plaintiffs*." Br. in Opp. at 10 (quoting *Alyeska*, 421 U.S. at 247 n.18 (1975) (emphasis added)).

CONCLUSION

For the reasons stated above, in the petition for writ of certiorari, and in the *amicus* brief of the several States, the petition for writ of certiorari should be granted.

Respectfully submitted,

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